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From the Desk of  
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Hon. Clifford W. Taylor  
Chief Justice  
Michigan Supreme Court  
Michigan Hall of Justice  
P.O. Box 30052 | Lansing, MI 48909

Re: Administrative File 2005-19 on jury trials

Dear Chief Justice Taylor:

I wish to comment on behalf of Kym Worthy, the Prosecuting Attorney for the County of Wayne, on the proposed rule changes for rules governing jury trials. My comments concern criminal trials only. I will first make some general comments, and then refer to the individual rules specifically.

***General Comment: Combining Civil and Criminal Rules is Not Desirable***

It is my very strong—though respectful—belief that the operating premise of the proposals here is mistaken; that is, that it is in fact *desirable* to “collect the rules governing jury trials in civil and criminal cases in a single rule.” There are distinctions between civil and criminal cases that are important (for example, the prosecutor cannot move for a directed verdict in a criminal case, but if the proposal is adopted, and is to be applicable to all cases, it provides that any party may move for a directed verdict at the conclusion of the proofs of the opponent, with no exclusion of the prosecution—surely the court cannot intend that this rule apply to criminal cases, particularly when there is a separate rule in the Rules of Criminal Procedure on the topic, and given that a directed verdict in favor of the prosecution is unconstitutional).

I believe it desirable to keep the criminal rules and civil rules *separate*, and, if there is going to be a chapter of Rules of Criminal Procedure (Chapter 6), that the rules governing a jury trial in criminal

cases be accessible to the bench and bar in *that* chapter. It cannot help but foster confusion to meld the civil and criminal rules governing jury trial into a single rule when some civil rules by definition cannot apply to criminal cases (indeed, some of the proposed subrules concern the Standard Civil Jury Instructions). Undoubtedly some of the rules in the civil and criminal rules will mirror each other, but this is, in my view, no reason not to keep all, or almost all, of the criminal rules in the chapter on Rules of Criminal Procedure (especially given that a number of the rules were recently amended following recommendations from a committee appointed by the court).

### ***Discussion of Individual Rules***

My discussion will focus on the innovations and changes in the proposed rules, with particular emphasis on provisions which displace or alter or add to existing provisions in the Rules of Criminal Procedure, my guiding principle being, as stated, that one should be able to find the rules governing criminal trials in the Rules of Criminal Procedure.

#### ● **MCR 2.512 Instructions to Jury**

##### (A) Request for Instructions.

- (1) At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.
- (2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.
- (3) A copy of the requested instructions must be served on the adverse parties in accordance with MCR 2.107.

- (4) The court shall inform the attorneys of its proposed action on the requests before their arguments to the jury.
- (5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

(B) Instructing the Jury.

- (1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.
- (2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

(C) Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

(D) \*\*\*\*\* (Concerns the Standard Civil Jury Instructions)

Rule 2.513 Conduct of Jury Trial ~~View~~

(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR

~~2.512(D)(2) does not apply to such preliminary instructions. By Jury. On motion of either party or on its own initiative, the court may order an officer to take the jury as a whole to view property or a place where a material event occurred. During the view, no person other than the officer designated by the court may speak to the jury concerning a subject connected with the trial. The court may order the party requesting a jury view to pay the expenses of the view.~~

***Comment***

**MCR 2.513(A):** Though contained in Rule 2.513(A), it seems to me the matter of preliminary instructions to the jury before evidence is taken belongs *before* the provisions in proposed MCR 2.512 concerning requests for instructions and the like. More to the point, the proposal with regard to

preliminary instructions micro-manages the trial judges to an unnecessary degree, in my opinion, and creates burdens on the parties that a large prosecutor's office will find difficult if not impossible to manage. The current criminal rule on preliminary instructions simply provides:

(A) Before trial begins, the court should give the jury appropriate pretrial instructions.

The proposed rule thus makes mandatory—if promulgated by the court—that in criminal cases the trial judge instruct not only on the elements of all the offenses charged, but that the *court* provide *each* juror with a set of “such” instructions. Does the “such” apply only to the instructions on elements? It appears not, but that it applies to all referenced instructions—“the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence,” and also “as well as the legal presumptions and burdens of proof.” And though the rule says that the “court” shall provide these sets of instructions, I am very concerned that judges will try to fob the duty off on the parties, particularly prosecuting attorneys. Further, does the requirement concerning instruction on the elements include included offenses, which may or may not be submitted to the jury, depending on the evidence?

In short, I would leave the criminal rules in the Rules of Criminal Procedure, and leave MCR 6.414(A) alone; should the court feel otherwise, at least it should be made clear that instructions on included offenses are not to be given either orally or in writing, that written instructions need only be provided with regard to the elements and not all other procedural matters the court may instruct the jury on preliminarily, and a single set of instructions should be made available for the jury, rather than individual sets. And I wish to be clear that I oppose written instructions at this time entirely, as I believe that they would be distracting, and result in some jurors leafing through instructions when testimony is being taken.

**MCR 2.513(A)(1),(3),(4):** The matter of instructions to the jury in criminal cases is covered quite cogently and quite well currently in MCR 6.414(A) and (H), which the proposal deletes. (A) was quoted above; (H) provides:

(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.

These provisions, only very recently “tweaked” by the court, work well; re-wording them and moving the criminal rules to a joint rule located outside of the criminal rules brings with it the worry of unintended consequences. There is simply no need to move these provisions out of the criminal rules, and they should be left as is.

**MCR 2.513(A)(2),(5):** The proposed rule requires written statements of the issues to be submitted to the court, and allows written statements of theories of the case to be submitted, though the court need not give the statement of issues/theory in the manner submitted. This provision exists currently in the rules, and is only moved here from Rule 2.516. And it is true that the rule has never been said to be inapplicable to criminal cases—in fact, refusal to give a fair statement of theory on request has been said to be error. See *People v. Savoie*, 75 Mich.App. 248 (1977). But written statements of the issues are unknown in criminal cases, and theories seldom requested or given. Not only should MCR 6.414 be maintained, but it should be made clear that the provision on issues and theories does not apply *at all* in criminal cases—this is what final argument is for.

● **MCR 2.513 (B) Court's Responsibility.** The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.~~By Court. On application of either party or on its own initiative, the court sitting as trier of fact without a jury may view property or a place where a material event occurred.~~

### ***Comment***

This is substantially the same as current Rule 6.414(B), which is fine to mirror in the civil rules, but I would, as I have said and will say repeatedly, leave Rule 6.414 alone as the applicable rule in criminal cases.

● (C) Opening Statements. Unless the parties and the court agree otherwise, the plaintiff or the prosecutor, before presenting evidence, must make a full and fair statement of the case and the facts the plaintiff or the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a similar statement. The court may impose reasonable time limits on the opening statements.

***Comment***

This is substantially the same as current Rule 6.414(C), which is fine to mirror in the civil rules (and thus omit the reference to “prosecutor” here), but I would, as I have said and will say repeatedly, leave Rule 6.414 alone as the applicable rule in criminal cases.

● (D) Interim Commentary. Each party may, in the court's discretion, present interim commentary at appropriate junctures of the trial.

***Comment***

Whatever its utility in civil cases, I think this a *very* bad idea in criminal cases. Most criminal cases are not *terribly* lengthy (though certainly they may be long and may be complex). There is nothing in the rule that limits the use of interim commentary to complex and lengthy trials (and I don’t believe a rule could be written that could define such trials appropriately so as to limit the reach of the rule), and I think it subject to abuse. It will, if employed, at least in criminal cases, almost certainly spark litigation as to the appropriateness of that which the trial judge either permits or prohibits a party from saying in such an interim commentary, and the rule is likely to be applied idiosyncratically. The last thing we need is *additional* areas for appellate litigation!

● (E) Reference Documents. The court must encourage counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, witness lists, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during trial with copies of the preliminary jury instructions, admitted exhibits, and other appropriate information to assist jurors in their deliberations.

***Comment***

The question is what “encourage” means—may a trial judge compel parties to prepare such a book? Is this one joint book or one from each party? If a joint book, if one side decides to participate but the other not, can the court compel the demurring party to participate? If not, can the court allow a book with material in it from only one party (e.g. witness lists, statutory provisions, cases, etc)? I think a court currently has discretion to allow exhibits and other written material into the jury room it believes appropriate (such as written instructions), and have great concern again about unintended consequences and increased appellate litigation.

● (F) Deposition Summaries. Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read.

***Comment***

This subrule demonstrates in part why the criminal and civil rules should be separate, as it has almost no application to criminal cases, where depositions are permitted only under rare circumstances, and may not be used in discovery. When prior recorded testimony is admitted in a criminal case under the rules of evidence, it should be read rather than a summary prepared (and this rule does not and should not apply, as I read it, to prior recorded testimony under the hearsay exception).

● (G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

- (1) Scheduling the presentation of the parties' expert witnesses sequentially; or
- (2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination; or
- (3) providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.

***Comment***

There are perhaps many ways of getting at the truth, or a semblance of it—legislative hearings, administrative hearings, civil-law investigations, and others. But a trial, and my focus is of course on the criminal trial, is an *adversary* process, and the parties must be allowed to try their cases presenting their witnesses in the order and using that strategy they see fit. I am strongly opposed to paragraphs (1) and (3) here, then (indeed, I cannot imagine how paragraph (3) would work within the rules of evidence, and the rule seems to disallow cross-examination altogether, as the experts would be giving a “discussion” in lieu of testifying—and it appears the judge could force this over the objections of the parties!). Some judges now follow paragraph (2) and allow experts to be present rather than sequestered. I would have no objection to something like paragraph (2), but believe it should appear both in the civil and criminal rules, keeping with my belief that the rules of criminal procedure should be discoverable in the Rules of Criminal Procedure chapter of the court rules.

● (H) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. If the court allows jurors to take notes, jurors must be allowed to refer to their notes during deliberations, but the court must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

***Comment***

This rule replicates most of MCR 6.414(D), but takes away the discretion of a judge to disallow jurors from taking their notes into deliberations. There is a concern that a juror’s notes might take precedence over the recollections of other jurors, or even a call for rereading of testimony that might be appropriate, and so the committee that recently proposed revisions to the Rules of Criminal Procedure, many of which were adopted, left this with the trial judge. I would recommend it be left as is, and that, in any event, even if modified the modification occur also in Rule 6.414(D) and the civil and criminal rules kept separate.



● (I) Juror Questions. The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

***Comment***

This rule substantially replicates MCR 6.414(E). Again, I would leave the rules governing criminal trials in the criminal rules and not delete Rule 6.414.

● (J) Jury View. On motion of either party, on its own initiative, or at the request of the jury, the court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no person, other than an officer designated by the court, may speak to the jury concerning the subject connected with the trial. Any such communication must be recorded in some fashion.

***Comment***

I would leave Rule 6.414(F), only recently amended by the court, as it is and where it is.

● (K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

***Comment***

If this rule is adopted it should be placed also in the criminal rules, in keeping with my view that the criminal rules should be found in the Rules of Criminal Procedure chapter. I would not favor its adoption, as I am afraid it will open up further litigation (were all jurors present when the discussion occurred? Did some jurors discuss evidence over lunch when other jurors weren't present, and so on).

● (L) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The plaintiff or the prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the plaintiff or the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

***Comment***

This rule substantially replicates MCR 6.414(G). Again, I would leave the rules governing criminal trials in the criminal rules and not delete Rule 6.414.

- (M) Comment on the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

### ***Comment***

I strongly oppose this rule. No matter what “take outs” a judge gives, the comments of the court on the weight of the evidence place a thumb on the scale and is, in my view, wholly inappropriate.

- (N) Final Instructions to the Jury.
  - (1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.
  - (2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

- (3) Copies of Final Instructions. The court shall provide each juror with a written copy of the final jury instructions to take into the jury room for deliberation. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.
- (4) Clarifying or Amplifying Final Instructions. Where it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions.

***Comment***

I oppose paragraphs (2), (3), and (4), and, at least for criminal cases, would leave MCR 6.414 as it is. The mandatory provision of a set of written instructions for *each* juror is unnecessary and in busy trial courts extremely problematic. I do not think inquiry into issues dividing or confusing jurors when a jury reaches an impasse is appropriate in criminal cases, and it may even be unconstitutional.

- (O) Materials in the Jury Room. The court shall permit the jurors, on retiring to deliberate, to take into the jury room their notes and final instructions. The court may permit the jurors to take into the jury room the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence.

***Comment***

This rule substantially replicates MCR 6.414(I). Again, I would leave the rules governing criminal trials in the criminal rules and not delete Rule 6.414.

- (P) Provide Testimony or Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

***Comment***

This rule substantially replicates MCR 6.414(J). Again, I would leave the rules governing criminal trials in the criminal rules and not delete Rule 6.414.

- **Rule 2.514 Rendering Verdict**

(A) Majority Verdict; Stipulations Regarding Number of Jurors and Verdict. The parties may stipulate in writing or on the record that

- (1) the jury will consist of any number less than 6,
- (2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury, or
- (3) if more than six jurors were impaneled, all the jurors may deliberate.

Except as provided in MCR 5.740(C), in the absence of such stipulation, a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree.

(B) Return; Poll.

- (1) The jury must return its verdict in open court.
- (2) A party may require a poll to be taken by the court asking each juror if it is his or her verdict.
- (3) If the number of jurors agreeing is less than required, the jury must be sent back for further deliberation; otherwise, the verdict is complete, and the court shall discharge the jury.

(C) Discharge From Action; New Jury. The court may discharge a jury from the action:

- (1) because of an accident or calamity requiring it;
- (2) by consent of all the parties;
- (3) whenever an adjournment or mistrial is declared;
- (4) whenever the jurors have deliberated and it appears that they cannot agree.

The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged.

(D) Responsibility of Officers.

- (1) All court officers, including trial attorneys, must attend during the trial of an action until the verdict of the jury is announced.
- (2) A trial attorney may, on request, be released by the court from further attendance, or the attorney may designate an associate or other attorney to act

for him or her during the deliberations of the jury.

***Comment***

This rule simply moves the current provisions of MCR 2.512. It has no application to criminal cases, and demonstrates that placing rules of criminal procedure outside of the Chapter 6 will cause confusion. This area is covered by MCR 6.420 in criminal cases, which the proposal does not propose to delete (and should not).

● Rule 2.515 Special Verdicts ~~Motion for Directed Verdict~~

(A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:

- (1) written questions that may be answered categorically and briefly;
- (2) written forms of the several special findings that might properly be made under the pleadings and evidence; or
- (3) the issues by another method, and require the written findings it deems most appropriate.

The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue.

(B) Judgment. After a special verdict is returned, the court shall enter judgment in accordance with the jury's findings.

(C) Failure to Submit Question; Waiver; Findings by Court. If the court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless the party demands its submission to the jury before it retires for deliberations. The court may make a finding with respect to an issue omitted without a demand. If the court fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.

### ***Comment***

This rule simply moves the current provisions of MCR 2.514. It has never had application to criminal cases, and demonstrates that placing rules of criminal procedure outside of the Chapter 6 will cause confusion. I have heard that there are those who assume that if the proposal is adopted this rule will apply to criminal cases, which demonstrates the confusion that will be caused, for surely it is not the court's intent that this rule apply in criminal cases.

## ● **Rule 2.516 Motion for Directed Verdict Instructions to Jury**

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A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.

### ***Comment***

This rule simply moves the current provisions of MCR 2.515. It has no application to criminal cases, and demonstrates that placing rules of criminal procedure outside of the Chapter 6 will cause confusion. This area is covered by MCR 6.419 in criminal cases, which the proposal does not propose to delete (and should not). Again, I have heard that there are those who assume that if the proposal is adopted this rule will apply to criminal cases, which demonstrates the confusion that will be caused, for surely it is not the court's intent that this rule apply in criminal cases.

## ● **Rule 6.414 Conduct of Jury Trial**

~~(A) Before trial begins, the court should give the jury appropriate pretrial instructions.~~

(B) Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements.

(D) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes, and they should not permit note taking to interfere with their attentiveness. The court also must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer in charge of the jurors, or any person appointed by the court to direct the jurors' attention to a particular place or site, and the trial judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.

(G) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The plaintiff or the prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the plaintiff or the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments and give any appropriate further



instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.

(I) Materials in the Jury Room. The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record.

(J) Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

***Comment***

This rule should not be deleted, and the criminal rules should be left in the Rules of Criminal Procedure.

Sincerely,

Kym L. Worthy  
Prosecuting Attorney

Timothy A. Baughman  
Chief of Research, Training, and  
Appeals